No. 6172

In the United States Circuit Court of Appeals

For the Ninth Circuit

NG MON TONG,

Appellantt,

vs.

LUTHER WEEDIN, as United States Commissioner of Immigration at the Port of Seatle, Washington,

Appellee.

Upon Appeal from the United States District Court for the Western District of Washington, Northern Division

HONORABLE JEREMIAH NETERER, JUDGE

Brief of Appellee

ANTHONY SAVAGE
United States Attorney

HAMLET P. DODD
Assistant United States Attorney
Attorneys for Appellee
Office and Postoffice Address:
310 Federal Building, Seattle, aWshington

JOHN F. DUNTON
United States Immigration Service, Seattle, Washington

On the Brief

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Brief of Appellee

STATEMENT OF THE CASE

The appellant, Ng Mon Tong, is of the Chinese race and claims to have been born in China on a Chinese date equivalent to December 14, 1917. He never resided in the United States. He arrived at the port of Seattle, Washington, on the steamer "President Grant" December 30, 1929, and applied

for admission into the United States as a citizen thereof by virtue of being a foreign-born son of Ng Ngin, a native-born United States citizen. He was denied admission by a Board of Special Inquiry at the Seattle, Washington, Immigration Station, his appeal to the Secretary of Labor was dismissed and his return to China was directed. Thereafter he filed a petition for a Writ of Habeas Corpus in the United States District Court for the Western District of Washington, Northern Division. The case now comes before this Court on appeal from the judgment of the District Court denying said petition.

ARGUMENT

The appellant was denied admission by the Board of Special Inquiry for the reason that his claim to be a son of Ng Ngin had not been satisfactorily established; and for the further reasons that he was an alien not in possession of an unexpired immigration visa, and was an alien ineligible to citizenship coming to the United States in violation of Section 13 (c) of the Immigration Act of 1924.

The American nativity and citizenship of the alleged father, Ng Ngin, were conceded by the immigration officials. Consequently, if the appellant were his blood son, he would be a citizen of the United States

under Section 1993 R. S., and the reasons for his exclusion other than the non-existence of the claimed relationship would have no force or effect. The only question at issue is whether or not, in refusing to concede the claimed relationship, the immigration officials abused the discretion committed to them by statute and rendered a decision which was arbitrary, capricious, and in flagrant disregard of the fundamental principles of justice.

It appears from the records that the alleged father was in China at a time to render his paternity of the appellant possible, *if the appellant were of the age claimed.* A son of the approximate name and age claimed by the appellant has been consistently mentioned by the alleged father, and by the alleged brother, Ng Mon Won, who testified in the present case.

Various discrepancies in the testimony are referred to by the chairman of the Board of Special Inquiry (pp. 98-97 of the record), and by the Board of Review in its memorandum (pp. 114-113). While there is not so much disagreement in the testimony with relation to family history and physical surroundings as exists in some cases, there are several discrepancies which should not exist if the relationship of father and son obtained. It does not appear necessary to

comment further on same here, as they are plainly set forth in detail on the indicated pages of the record.

In their Brief counsel aver that the disagreements in the testimony have no bearing on the issue and that the evidence conclusively establishes the appellant's right to admission into the United States, and that the denial of his application for admission was an arbitrary ruling, unsupported except by the suspicion and prejudice of the members of the Board of Special Inquiry; also that the second examination of the alleged father and brother at Houston, Texas, was obviously for the purpose of developing discrepancies. They also state that, sometime prior to the return of the record of this re-examination: "the special Board of Investigation withdrew from the case, voluntarily, or involuntarily, we cannot say"; also that the fact that the hearing before the second Board of Special Inquiry was begun and completed March 14, 1930, constitutes indisputable evidence that the record was not read and considered by the members of the board at any time, or at all, before the chairman wrote up and signed his findings, and that the members of this new board, having decided to arbitrarily deny the application, the chairman sought out enough of the record to justify, as he imagined, his Conclusions and Findings for the rejection of the appellant; and that

"this circumstance alone justifies the claim that this applicant has not had a fair and unbiased trial by a whole Board of Special Investigation as required by the law." In other words, counsel appear to charge that the members of the Board of Special Inquiry which decided this case were prejudiced against the appellant from the start and rendered their decision without any reference to the evidence. They seem to ignore the fact that all the members of this board were sworn officers of the United States government, and that it was their duty as such to decide this case, as well as any other cases which come before them, according to their best judgment. We see no reason why they should have been prejudiced against this particular Chinaman to such a degree as to lose sight of their duty, nor do we see any justification for the charges to that effect made by counsel, nor do we see any reason why the members of the board did not have ample time to consider all of the evidence, especially in view of the fact that their examination of March 14, 1930, covers only four pages of the record. The personnel of the second board (which decided the case) is explained by the statement at the head of the hearing, that none of the members of the first board were available, and there is no justification whatever for the statement of counsel that they "withdrew from the case."

We are unable to see any merit whatever in the statements and reasoning of counsel, in their Brief, regarding the appellant's age, especially in their conclusion that he was between fourteen and fifteen years of age at the time he was examined by the Board of Special Inquiry and Dr. Bailey (p. 13), and their statement (p. 14) that the actual age of appellant is not so material. The appellant's birth is claimed to have taken place in Haw Ju Village, China, C. R. 6-11-1, which is equivalent to December 14, 1917, and, inasmuch as the alleged father's departure for China did not take place until December 22, 1916, (San Francisco 25223/3-24), it would be impossible for the appellant to be appreciably older than is stated, and be his son.

According to the claimed date of his birth the appellant was less than one month over twelve years of age when he was examined by the first Board of SpecialInquiry and the Medical Examiner of Aliens, Dr. A. R. Bailey (January 6, 1930), and was twelve years and three months old on the date on which the members of the second Board of Special Inquiry expressed their opinions as to his age (March 14, 1930).

Page 7 of the record consists of the certificate of A. R. Bailey, A. A. Surgeon, U. S. Public Health Service, to the effect that, judging from appellant's *gen-*

eral appearance, teeth and sexual development, he was of the opinion that the appellant was *between seventeen and twenty-two.*

The opinions of the members of the Board of Special Inquiry are set forth on page 102 of the record as follows:

"Inspector Matterson:

"From the height and general appearance of applicant, his manner of testifying, and the fact that his voice is heavy like a boy who has passed the age of puberty, I believe him to be between seventeen and twenty years of age American reckoning."

"Clerk Miller:

"I would estimate him to be not less than sixteen years of age by American reckoning, and not more than twenty years."

"Chairman:

"Judging from the general appearance of applicant and his manner of speech, I believe him to be not less than seventeen years of age and not more than twenty-one years of age."

From the foregoing it will be noted that only one member of the Board of Special Inquiry conceded that the appellant could be less than seventeen years of age, which also was Dr. Bailey's minimum estimate, and that two members of the board estimated that he might be as old as twenty, and the chairman that he might be twenty-one, while Dr. Bailey conceded that he might be twenty-two.

Counsel contend that these opinions are not admissible as evidence and refer to Dr. Bailey's certificate as an *ex parte* statement, because Dr. Bailey was not present at the hearing before the Board of Special Inquiry. The doctor's certificate shows that he examined the appellant and the grounds on which he based his estimate, and we are unable to conceive what bearing his presence at or absence from the Board of Special Inquiry hearing could have on his opinion.

Immigration officials are not restricted in reception of evidence to such as meets the requirements of legal proof, but can receive and determine the questions before them upon any evidence that seems to them worthy of credit:

> *Johnson v. Kock Shing*, 3 F (2d) 889 (CCA 1);
>
> Certiorari denied *Kock Shing v. Johnson*, 269 U. S. 558;
>
> *Moy Said Ching v. Tillinghast*, 21 F (2d) 810, 811 (CCA 1);

In *U. S. ex rel Smith v. Curran*, 12 F (2d) 636 (CCA N. Y.), it was held that in proceedings in immigration cases, neither the hearsay, the best evidence, nor any of the common law rules of evidence need be observed.

That this appellant could be only slightly over twelve years of age and still have such general appearance, teeth and sexual development that a physician

of Dr. Bailey's wide experience could conclude that he is at least seventeen, and maybe twenty-two, and such general appearance, quality of voice and manner of testifying that the Board of Special Inquiry could conclude that he might be as old as twenty, is too absurd to be conceivable. In this connection it will be noted (p. 8 of the record), that the appellant testified that he *shaved himself, and that he commenced to shave himself about two years ago.*

That the apparent ages of Chinese applicants for admission into the United States, and estimates by government physicians regarding the ages of such persons, constitute material evidence, has been conceded by the courts in the following cases:

In re *Wong Siu Kay*, No. 10764, D. C. W. D. Wash. (not reported);

In re *Lee Suey Ning*, No. 11092, D. C. W. D. Wash. (not reported);

In re *Yee Cho Do*, No. 12150, D. C. W. D. Wash. (not reported);

In re *Jee Ling Quong*, No. 20337, D. C. W. D. Wash. (not reported);

U. S. ex rel Soo Hoo Hong v. Tod (CCA 2), 290 F 689;

Wong Fook Ngoey v. Nagle (this court), 300 F 323;

Fong Lim v. Nagle (this court), 2 F)2d) 971;

Yung Fat v. Nagle (this court), 3 F (2d) 439;

Tom Him v. Nagle (this court), 27 F (2d) 885;

Lew Git Cheung v. Nagle (this court), 35 F. (2d) 452.

In the case of *Woo Hoo v. White*, cited by counsel, the appellant claimed to be twenty years of age, and the certificate of two surgeons was to the effect that in their opinion he was within one year either way of twenty-three. This opinion was not based on any scientific data or otherwise than on appellant's general appearance.

In the case of *Johnson v. Damon* the excluding decision of the immigration officials was based solely on discrepancies in the testimony, which the court did not consider of sufficient importance to constitute substantial evidence against the appellant's claim.

In the case of *Brader v. Zurbrick*, it was held that an *ex parte* and unverified statement by the Clerk of the Superior Court at Michigan City, Indiana, that a search of the records of said court failed to show any record of naturalization papers having been issued to the said Louis Brader or his father, was not evidence. The court evidently erred in holding that Brader's status regarding citizenship had any effect upon the appellant's status, as the marriage did not

take place until 1923—if the date is correctly reported.

The present case differs from that of *Woo Hoo v. White, supra*, in that the disparity between the claimed and apparent age of the appellant is much wider in the present case, and also in the fact that it is much easier to judge whether a person is twelve years old or from seventeen to twenty-two than it is to judge whether he is twenty or twenty-three. The opinion of Dr. Bailey in the present case is also founded on scientific data. Such certificates as the present one have always been recognized in this court. We are unable to see in what manner the cases of *Johnson v. Damon* and *Brader v. Zurbrick* have bearing on the present case.

In *U. S. ex rel Fong On v. Day*, cited by counsel, the District Court took exception to the certificate of Surgeon E. L. Mullan, Public Health Service, because it did not state Dr. Mullan's "qualifications" and because the said certificate was a "mere statement of a conclusion of fact withuot a description of the examinations or tests on which it was based." In that case the applicant claimed to be twelve years old and the certificate of the surgeon was to the effect that, in his opinion the applicant was at least sixteen. The court also appeared to be of the opinion that, if the surgeon's statement were not taken in question and

answer form, it should be in affidavit form, with a statement of deponent's qualifications and the details on which his conclusions were based. There does not appear to be anything in the report of this case to indicate the individual opinions of the members of the Board of Special Inquiry as to the applicant's age. We are unable to see by what process of reasoning the decision in this case, by one District Judge, could be considered as controlling the decision of this court. It is also noted that, instead of sustaining or dischargingthe writ, the District Court ordered the case referred to a Special Master to take proof and make report to the said District Court.

Section 23 of the Immigration Act of 1924 (43 Stat. L. Ch. 190, p. 153) places the burden of proof upon applicants for admission into the United States, and this doctrine has been uniformly upheld by the courts.

Rule 10, Subdivision 3, of the Chinese Rules of the Department of Labor of October 1, 1926, provides as follows:

"In every application for entry as the child of a citizen there shall be exacted convincing proof of relationship asserted as the basis for admission. * * *"

Section 17 of the Act of February 5, 1917 (39 Stat. L. 874) provides:

"* * * In every case where an alien is excluded from admission into the United States under any law or

treaty now existing or hereafter made, the decision of a Board of Special Inquiry shall be final unless reversed on appeal to the Secretary of Labor. * * *"

In the case of *Chin Share Nging v. Nagle* (CCA 9), 27 F (2) 848, the court said:

"* * * The conclusions of administrative officers upon issue of fact are invulnerable in the courts, unless it can be said that they could not reasonably have been reached by a fair-minded man, and hence are arbitrary. * * *"

On collateral review of deportation proceedings in habeas corpus, it is sufficient if some evidence supported the order, in the absence of flagrant error:

> *U. S. ex rel Vajtauer v. Commissioner of Immigration*, 273 U. S. 103.

Unless it affirmatively appears that the executive officers have acted in some unlawful or improper way, and abused their discretion, their finding upon a question of fact must be regarded as conclusive, and is not subject to review by the courts:

> *U. S. ex rel Leong Ding v. Brough* (CCA 2), 22 F. (2d) 926;
>
> *United States v. Ju Toy*, U. S. 253, 49 L. Ed. 1040;
>
> *Chin Yow v. United States*, 208 U. S. 8, 52 L. Ed. 369;
>
> *Low Wah Suey v. Backus*, 225 U. S. 460.

In the case of *Gung You v. Nagle*, 34 F. (2d) 848, this Court said, at page 851:

"* * * The present statement of the rule is that the courts will only interfere in such plain cases of flagrant disregard of fundamental principles of justice as constitute a denial of due process of law."

"The courts are powerless to interfere with conclusions of the immigration authorities and can only deal with cases where the principles of justice have been flagrantly outraged. * * *"

CONCLUSION

The appellant was accorded a fair hearing by the immigration officials and failed to sustain the burden which was upon him to establish his claim. The evidence did not constitute convincing proof that the appellant is the son of his alleged father, and was not of such a nature as to require, as a matter of law, a favorable finding in that respect. The discrepancies in the testimony and the apparent age of the appellant constitute evidence upon which the immigration officials could reasonably arrive at their excluding decision. The said officials did not abuse the discretion committed to them by statute, and their excluding decision was not arbitrary, or capricious, or in contravention of any rule of law, or in conflict with any principle of justice; *hence it is final.* The District

Court did not commit error in denying the writ of habeas corpus, and its decision should be *affirmed.*

Respectfully submitted,

ANTHONY SAVAGE,
United States Attorney,

HAMLET P. DODD,
Assistant United States Attorney,
Attorneys for Respondent.

JOHN F. DUNTON,
U. S. Immigration Service,
Seattle, Washington,
On the Brief.